IN THE

Supreme Court of the United States

October Term, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF LOUISIANA, *Defendant*

SECOND PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the State of Louisiana and moves the Court for leave to file a Second Petition for Rehearing, as set forth hereinafter.

The ground of the petition is that a Rehearing is appropriate because of the nature of the opinion of the Court rendered herein on June 5, 1950 and the decree which has been proposed by plaintiff and the Objections thereto which have been filed by Louis-

iana. These raise entirely new matter and place the case in a radically new light, which makes it appropriate and necessary that this petition for a rehearing be granted.

I

Complaint Alleging Title, and Answer Denying Same and Setting Up Title in Defendant Constitute Action at Law Over Title and Right to Property

Complaint alleges that the United States was and is "the owner in fee simple of, **or** possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters," within the State boundaries.

In its Answer, Louisiana denied the allegations of title in the United States and set up its own title to all said lands, minerals and other things underlying the Gulf of Mexico and all navigable waters within its territorial limits, subject to the constitutional paramount powers and rights of the United States in such area.

Thereby the issue of title was squarely placed before the Court and was triable at law.

True, the United States asked for an injunction against Louisiana, its lessees and all persons claiming under it, from trespassing upon the area in alleged violation of the rights of the United States and for an accounting of all sums of money derived by the

State from said area. Such prayer for injunction is only an incident to the main demand for title and possession of the property at issue, and does not change the character of the suit from an action at law.

There is a perfectly clear and orthdox remedy at law for the recovery of real property, and that is the common law action of ejectment. Plaintiffs seeking to circumvent the classic legal remedy of ejection by suing in equity, or by injunction to recover real property, have always been relegated to their remedy at law.

Scott v. **Neely,** (1891) 140 U. S. 106
Rocky Mountain Fuel Co. v. **New Standard Coal Mining Co.** (C.C.A. Colo. 1937) 89 F (2d) 147
Whitehead v. **Shattuck,** (1891) 138 U. S. 146
Smith v. **New Orleans Canal & Banking Co.** (1891) 141 U. S. 656
United States v. **Wilson** (1886) 118 U. S. 86
Fussell v. **Gregg** (1885) 113 U. S. 550
Ellis v. **Davis** (1883) 109 U. S. 485
Lewis v. **Cocks** (1874) 23 Wall. 466, 470
Ripp v. **Babin** (1857) 19 How, 271, 277

As was said in Whitehead v. Shattuck (1891) 138 U. S. 146 **supra.** (p. 151):

> "It would be difficult, and perhaps impossible to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that **where an action is simply for the re-**

> **covery and possession of specific real or personal property, or for the recovery of money judgment, the action is one at law.** An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; **and in a contest over the title both parties have a** constitutional right to call for a jury." (Emphasis added).

And as was said in **Lewis** v. **Cocks**, 90 U. S. 466, 470:

> "It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. **Hipp** v. **Babin**, supra."

Moreover, the question of title and right to possession disputed between two sovereign States of the Union, Kentucky and Indiana, has been tried at law in an action of ejectment, by jury. **Hendly's Lessee** v. **Anthony** (1820) 5 Wheaton 374.

In addition, it is elementary that an injunction may not be obtained in order to take real property out of the possession of one party and put it into that of another.

Lacassagne v. **Chapuis** (1892) 144 U. S. 119
High on Injunction (2d Ed) 355
28 **American Jurisprudence** 332, "Injunctions", Sec. 132, 298
43 **Corpus Juris Secundum** 513, "Injunctions", Sec. 54

Moreover, all the lands under navigable waters are real estate in every sense; and it is the clear law in this Court that ejectment is the appropriate remedy for suing to recover lands under navigable waters.

Martin v. *Waddell*, 16 Pet. 367
Lowndes v. *Huntington*, 153 US 1
Morris v. *United States*, 174 US 196

As was said in *Morris* v. *United States*, 174 US 196, 230, *supra,*

> "Indeed, it was held in *Martin* v. *Waddell* that lands under navigable waters were subject to an action of ejectment."

Finally, the question as to who has fee simple title and the right to possession present a perfectly clear, triable issue of fact, provable by evidence of the widest character. As is stated in Section 269 American Jurisprudence:

> "269. PROOF OF TITLE TO, AND RIGHT TO POSSESSION OF, PROPERTY.—On an issue involving title or the right to possession of property, any evidence, not rendered inadmissible by some one of the exclusionary rules of evidence, such as the hearsay-evidence rule or the rule which excludes evidence by mere opinions of witnesses, which bears upon the issue of title or right to possession or characterizes the nature of one's possession is admissible. * * * *
>
> "In property cases where the title and right to possession of realty are in question, deeds and other muniments of title are admissible as tending to show title or right to possession as are public statutes and grants where they constitue title papers of a party; and where title by adverse possession is claimed, any act or series of acts which shows the open, notorious, exclusive, and hostile possession of the one who claims to be the owner of the land may be proved as evidence of adverse possession."

And as was said in **Smyth** v. **New Orleans Canal & Banking** Co. (1891) 141 U. S. 656, where a suit in equity in which the Plaintiff sought "to have his alleged title adjudged to be valid" was dismissed on the ground that the plaintiff had an adequate remedy at law in ejectment (p. 661):

> "The **facts** upon which a title to the premises in controversy rests, or by which such title can

be defeated, can be readily shown in an action at law."

"In a single action at law all the **facts** can be established, and all the questions necessary to determine the right to the property can be considered and disposed of". (Emphasis added.)

Louisiana has always been prepared to present a very considerable amount of evidence of the widest character to prove her undisputed title and right to possession of the marginal sea bed off Louisiana for more than 136 years.

II

Plaintiff Made Disjunctive Claim to Title or Paramount Power; Abandoning Claim to Title and leaving No Justiciable Controversy Because Constitutional Paramount Power and Rights of United States Admitted and Never Questioned by Defendant.

Plaintiff's claim as the owner "in fee simple of, **or** possessed of paramount rights in and full dominion and power over, the lands, minerals", etc. in the area described, is stated in the disjunctive,—the plaintiff indicating that it claimed either one of two very different things, (1) fee simple title, or (2) paramount rights, dominion and power over the area in question, but not both title and paramount rights, etc.

It has been pointed ou before that the United States prior to the decision of June 5, 1950, had abandoned its claim to fee simple title, as in fact, this Court had denied its claim o fee simple title in the

California case; but the Court's opinion in this case failed to recognize that legal situation.

There is no issue in this case as to "paramount rights", etc. of the United States, because, in its answer, Louisiana admitted all and whatever paramount powers, right, etc. the United States may have over Louisiana's navigable waters and the soils and resources under them, as provided in the Constitution, laws and treaties of the United States.

Neither the plaintiff's attorneys nor the Court can substitute any such issue or justify any judgment or decree based on any controversy between Louisiana and the United States over the paramount powers, rights, etc. of the United States, under the Constitution, laws and treaties of the United States, because it is of record in the pleadings of this case that Louisiana has admitted them and no justiciable controvery, therefore, exists on this question.

Neither can such ficticious issue be seized upon to justify the issuance of an injunction against the State of Louisiana, unless such injunction be used as a subterfuge to avoid a trial at law on the question of title and right to the property and thereby indirectly place title and the right of possession to such property in the United States and confiscate the property of the State of Louisiana without trial or hearing on the merits and without due process of law.

In this regard, the Louisiana case also is radically different from the California Case, in which

that State argued to this Court that the United States had no "power or jurisdiction" over the lands underlying navigable waters for California and that the State "alone had the jurisdicion to regulate" that area. California Brief p. 104 and Appendix p. 159.

In that case, this Court rejected that argument by stating that the area there involved could not be "blocked off", or "set apart" for exclusive use by the State. 332 U. S. 1, 25.

No such situation exists in this case, and the California Case, therefore, cannot be accepted as precedent for this case.

Furthermore, it is admitted that Congress has the exclusive authority to establish and assert federal policy within its constitutionally delegated powers.

It must be admitted, further, that Louisiana has exercised no right, nor has it enacted any law in conflict with any legislation by Congress.

Therefore, under most recent decisions of this Court, where Congress has not exercised rights it may have, this Court held that it was not the holding in the California Case that States did not have the power to preserve and regulate the exploitation of important natural resources in the sea, within their boundaries, in the absence of federal legislation on the subject or in the absence of a conflicting federal policy. **Toomer** v. **Witsell**, 334 U. S. 385 and **Skiriotes** v. **Florida**, 313 U. S. 69.

III.

California's Case Radically Different from This Case.

In its original opinion, this Court denied Louisiana a hearing on the merits of the case, thereby denying the State the right to present its evidence against the claim of title by the United States and in support of its own title.

The Court said it thought **United States v. California,** 332 U. S. 19, controlled this case and there should be a decree for the complainant.

In fact, the circumstances in the California Case and this Case are radically different.

In the California Case, as this Court held, neither the United States nor California "suggested any necessity for the introduction of evidence". 67 S. Ct. @ 1661.

However, as vigorously as a litigant in this Court may do so, Louisiana sought a trial on the merits of the issue of fee simple title, in order to disprove the claim of title by the United States and to prove its own title to the property in question; but this Court refused to give defendant its day in Court and denied it the right to offer evidence in support of its title, contrary to all rules of procedure in courts of law and justice in these United States.

Furthermore, the California case, taken as precedent by this Court, is radically different from this case, in that when plaintiff submitted a form of de-

cree in the California case reciting that "The State of California has no title thereto or property interest therein",—the State of California made no objection thereto and, in effect, acquiesced in the inclusion of such statement in the Court's decree.

To the contrary, Louisiana has objected to the decree proposed by the United States, particularly against the inclusion of the statement that, "The State of Louisiana has no title thereto or property interest therein"—with supporting reasons.

IV.

Evidence Should Be Heard Regarding Title of Original States and of Defendant to Their Submerged Lands and Resources Before Final Decision in This Case.

In the California Case, the Court said they had been referred to no document, treaty or chapter, which showed that the original colonies or states had acquired ownership to the "three mile ocean belt" or the soil under it.

This "three mile ocean belt" reference showed conclusively a complete lack of information and understanding by the Court, because of the failure of introduction of evidence on the subject in the California Case.

All evidence of title in the Original States to their maritime belt and soil and resources thereunder, within their boundaries, is relevant to the issue in this case because Louisiana, as a State since admtted on an

equal footing with the Original States, has the same sovereignty and proprietary rights to its maritime belt and the soil and resources thereunder as the Original States.

Louisiana has been and is prepared, and should not be denied the right, to introduce in evidence the charters of the original colonies, which would show that the British Crown vested fee simple title in them to the soils, minerals, etc. within the main land, the islands and seas adjoining in some cases, 10, 20 and 100 leagues from shore, and that by the Declaration of Independence of 1776 and the Treaty of Peace between the Original States and the British Crown in 1783, the British Crown relinquished to the Original States, separately and by name, all of the rights and title of the British Crown to its maritime belt and the soils and resources thereunder.

The following are excerpts from some of these original charters and treaty, which should be received in evidence of the title of the Original States:

British Crown Charters:

1. First North Carolina Charter, March 25, 1584, conveying all the soil of such lands, with the rights, royalties, franchises and jurisdictions as well marine as other, within the said lands, or countries, **or the seas thereunto adjoining.**
2. The Virginia Charter, March 9, 1611, annex- all islands within 300 leagues of the coast, conveying the **soils,** lands, grounds, **minerals, etc.,** both **within the** said tract of land upon the main, and also within said islands and **seas adjoining**, etc.

3. The Plymouth Colonial Charter, Nov. 16, 1620, granting all territories throughout the mainland with, **all the seas**, rivers, islands ports, both within the same tract of land upon the main; also within the said islands and **seas adjoining**.

4. Charter of Massachusetts Bay, 1691, defining the boundary "throughout all the main land from **seas to sea**, together also with **all soils, royalties upon the main and also within the islands and seas adjoining.**"

5. Grant to the Council of Plymouth, confirmed April, 1639, granting "all and sigular prerogatives, royalties, **as well by the sea as by land** within the said province and coast of same and within the **seas** belonging or adjacent to them."

6. New Hampshire Grant, confirmed April 22, 1635, conveying "the **seas** and islands lying witnin any 100 miles of any part of said coast of country aforesaid, together with **all the firm lands, soils, waters, fish, royalties**, both within the said tracts of lands **upon the main and also with the islands and seas adjoining.**"

7. Charter grant to Lord Baltimore for Province of Maryland, June 30, 1632, conveying "all that part of the peninsular lying between the ocean on the East and the Bay of Chesapeake on the West, from Watkins Point to the main ocean on the East, the islands which have been or shall be formed within **the sea within 10 marine leagues from the shore**; with all ports, harbors, bays and straits belonging to the region or islands aforesaid within 10 marine leagues from shore; **and all soil, with the fishings in the sea, with all prerogatives, royalties, as well by sea as by land within the limits aforesaid.**"

8. Georgia Charter, June 9, 1732, conveying "all the precincts of land within the said boundaries, with the islands on the sea lying opposite to the Eastern coast of said lands, **within 20 leagues of the same, together with all the soils, gulfs and bays, mines, waters, fishings, royalties, in any sod belonging or appertaining.**".

Further, the Treaty of Independence with the British Crown of April 11, 1783 acknowledged the United States, naming the 13 Original States each by name, to be free, sovereign and independent states, and stating that the British Crown treated with **them** as such and relinquished unto **them** all claims to the **government, proprietary and territorial rights** of the same and every part thereof; and, in Article 2, agreed upon and declared the boundaries of the said named 13 Original States to extend into the Atlantic Ocean, comprehending all islands **within 20 leagues of any part of the shores of the United States.**

In Harcourt v. Gaillard (1827), 12 Wheat. 523, this Court held that that treaty was "the most solemn of all international acts", and that there was no territory within the United States that was claimed in any other rights than that of some one of the confederate states; and, therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.

The Court further held that both Original States, South Carolina and Georgia **had acquired their original title by grants from the Crown; and that the limit of their claims was asserted by both States in Declaration of Independence and the right to it was**

established by the most solemn of international Acts, the Treaty of Peace.

The Court will note from this most solemn treaty, which also is the supreme law of the land, under our Constitution, that the boundaries of the Original States were not fixed at "three miles;" nor was the claim to any such alleged three-mile belt first asserted by the national government, as stated in the opinion of the California Case and in this Case.

This international treaty has never been questioned by the Government of any other nation. All the waters within those 20 leagues (not 3-miles), off the shores of the Original States constitute our domestic waters.

For purposes of national defense and international relations, the United States, undoubtedly, has paramount power and dominion over these 20 leagues and they should not be restricted to three-miles in the decision of such important cases, especially without the taking of evidence to properly inform the Court.

Unless this Court in the California Case meant to overrule every one of the scores of prior U. S. Supreme Court decisions in point, it still is the settled jurisprudence in this country that,

> "When the revolution took place, the people of each state, themselves, became sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

Martin v. **Waddell** (1842), 16 Peters 367, 410;
Mumford v. **Wardwell** (1867), 6 Wall. 432, 436;
County of St. Clair v. **Lovingston** (1874), 90 U. S. 46, 68;
McCready v. **Virginia** (1867), 94 U. S. 391, 394;
Schivley v. **Bowbly** (1893), 152 U. S. 1, 16;
Massachusetts v. **New York** (1926), 271 U. S. 65, 85.

In Johnson v. **McIntosh** (1823) 8 Wheat. 543, 584, adjudcating upon lands in controversy within the chartered limits of Virginia, this Court, through the great Chief Justice Marshall, unanimously held:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States' whose boundaries were fixed in the 2d article. By this treaty, the **powers of government, and the right to soil,** which had previously been in Great Britain, **passed definitely to these states.**" (Emphasis supplied).

To the same effect, as to Maryland, another Original State, **Smith** v. **Maryland**, 59 U. S. 18 How. 71, 74.

May we pause here, and ask if the powers of government, also secured by the people of the original States in their collective sovereignty by the same Declaration of Independence and Treaty of 1783, and not delegated to the United States government in the Constitution, and acquired by all States since admitted into the Union on an equal footing with the original States, may be destroyed or nationized by decree or "injunction" of this Court?

In short, can the sovereignty of all States of the Union be destroyed by arbitrary decree or "injunction" without trial, as sought here by the Attorney General?

And as to new States admitted on an equal footing with the Original States, this Court has consistent held that:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the Original States in the tidewaters and in the lands under them within their respective jurisdictions. The title and rights of riparian are littoral proprietors in the soil below high water-mark, therefore, are governed by the laws of the several States subject to the rights granted to the United States by the Constitution".

Pollard v. **Hagen** (1845), 3 How. 212.
Schively v. **Bowbly** (1893), 152 U. S. 1;
Port of Seattle v. **Oregon & Washington R. R.** Co., 225 U. S. 56, 63;
Memford v. **Wardwell** (1867), 6 Wall. 423, 436;
Weber v. **Harbor Commissioners,** 18 Wall, 57;
Borax Ltd. v. **Los Angeles,** 296 U. S. 10;
I. C. R. R. Co. v. **Illinois** (1892), 146 U. S. 435, (same as to Great Lake States).

Evidence will show that Louisiana formed a part of the original Louisiana territory ceded to the United States by France under the Treaty of 1803, and was admitted into the Union on the same footing as the Original States.

In 1836, this Court held that such public property as the rivers, the sea and its shores were formerly

held by the Crown under the French and Spanish laws for the common use of men, which the King could not alienate, and that as to such public properties, which were public by nature, including the river bank or quay at New Orleans, the United States had not acquired title under the Treaty of Cession, but that title to such properties, (the rivers, the sea and its shores), passed to the people of Louisiana by the French Treaty of 1803. **New Orleans v. United States**, 10 Pet. 662, 731.

This decision along with the treaty, constitute muniment of title to the people or State of Louisiana, and should not be lightly "put to one side", as the Court said in its opinion, without even permitting the introduction of any evidence as to Louisiana's title. The principle of law which was adopted by the Court in that case involved not only the quay or river bank in question but also the sea and its shores within the State boundaries, and is most pertinent here.

Further, in **Louisiana v. Mississippi**, 202 U. S. 1, 52, 53, the Court held "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States."

V.

Paramount Power and Dominion of the United States Does Not Change Character of Action from One at Law to Equity, Nor Justify Confiscation of Property.

In the California Case, this Court said the United States asserted rights in two capacities, transcending

those of a mere property owner, the first being the ercise of power and dominion necessary in the national defense and the other being as a member of the family of nations.

Neither of these paramount rights of the United States conflict with property rights of states or of individuals, and if that finding is held to justify the confiscation of property of the state held in trust for its people in their collective sovereign capacity, then that decision would mark the end of the right of private ownership of property in this country as well,—for the United States owes the same obligation of national defense and international relations to all privately owned property in this country as well as to the property of the states which are submerged under their navigable waters within their boundaries. All classes of property, private and State publicly owned alike, are subject to regulation and control under the paramount powers of the United States found in the Constitution, laws and treaties of this country.

Such national defense and international obligations of the United States, however, do not change the character of this litigation over title to property from that of an action at law to one in equity to be decided by the issuance of injunction, nor does it justify confiscation of defendant's property without trial on the merits.

Further, if the property of a state, the same as that of an individual, be it submerged land or oil

within its navigable waters, be needed for national defense or other public purposes, the government may resort to its power of eminent domain and may expropriate the same upon payment of just compensation, wherever necessary in the interest of national defense or of any of the other constitutional rights and powers of the U. S. Government.

Confiscation and nationalization of property, without compensation, cannot be condoned under our Constitutional form of government, the American-way.

In this case, the Court states, "The issue in this class of litigation does not turn on title or ownership in the conventional sense."

Therefore, since there was no consideration of the issue of title or ownership of the property in question, and defendant was refused the right to introduce evidence of title, no decision or decree should be rendered by the Court which would take the property away from defendant and give it to plaintiff by the subterfuge of a writ of injunction prohibiting defendant and its lessees and licensees from continuing to use its property as it has done since 1812.

It is a long established principle of law, consistently acknowledged by this Court that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's. **Harcourt** v. **Gaillard** (1827) 12 Wheat. 523, 529.

Furthermore, it is well established jurisprudence as held in **Indiana** v. **Kentucky**, (1889), 136 U. S. 479, that,

> "For the security of rights, either of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be injected with greater justice and propriety than in the case of disputed boundary."
>
> " . . . . the constant and approved practice of nations shows that by whatever name it be called, (prescriptions?) the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by law of nature and the municipal code of every civilized nation, a similar possession of an individual excludes the claims of every other person to the article of property in question." Vattel, in this law of Nations, Part II Chap. IV par. 164.

Arkansas v. **Tennessee** (1940), 310 U. S. 563, 570-571.

Wherefore, the State of Louisiana moves that leave be granted to file this petition for rehearing and that the case be restored to the docket for reargument, and upon consideration, the petition be granted and the decision previously rendered be reversed and the complaint dismissed, or that, in the alternative, the case be fixed for trial in accordance with law and with full opportunity for defendant to

submit its evidence of title, and for judgment as prayed for by defendant, all in accordance with the Constitution and laws of the United States.

Respectfully submitted,

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I hereby certify that the within Petition for Rehearing is believed to be meritorious and is well founded in fact and in law, and that it is presented in good faith and not for delay.

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Attorney General,
State of Louisiana.